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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

DONALD L. WARNER, by his next friend,
JAMES A. WARNER, JR., and
JAMES A. WARNER, JR.,
Petitioner,

v.

KEWANEE MACHINERY & CONVEYOR CO.,
a foreign corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Donald L. Warner, by his next friend, James A. Warner, Jr., and James A. Warner, Jr., petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cause on June 16, 1969.

CITATION TO OPINION BELOW

The opinion of the United States Court for the Sixth Circuit does not appear in the official reports but has the Court of Appeals Number 18667 and is appended hereto.

JURISDICTION

Judgment upon a jury verdict for plaintiff-petitioner was entered on July 5, 1967, by the United States District Court for the Eastern District of Michigan, Southern Division. The Court of Appeals for the Sixth Circuit reversed the jury verdict on June 16, 1968. The jurisdiction of the Supreme Court is conferred by Title 28, United States Code, Sections 1254 and 2101(c).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals exceed its jurisdiction and violate Rule 50, Fed. R. Civ. P. when it held that "plaintiff's evidence construed most favorably to him does not establish a case of negligence", despite the fact that it acknowledged it could not review "the sufficiency of the evidence" on appeal because of the respondent-defendant's failure to move for a directed verdict or judgment N.O.V.?

2. Where the Court of Appeals has jurisdiction under 28 U.S.C. 1291 and 28 U.S.C. 2106 to review only legal errors committed by the lower court, did it have jurisdiction to review and reverse a jury verdict, when there was no

judgment, decree or order on the question of liability, there being no motion for directed verdict, judgment N.O.V., or new trial?

3. Where there was no order or ruling requested of or made by the trial judge on the submissibility of a case to the jury, does the Court of Appeals' reversal of a jury verdict on the ground that the petitioner-plaintiff's evidence did not "establish a *prima facie* case", deprive petitioner-plaintiff of his right to jury trial under the 7th Amendment to the United States Constitution?

4. Where an exhibit was admitted into evidence for purposes of impeachment, did the Court of Appeals violate Rule 51, Fed. R. Civ. P. in holding that the only prejudicial error in the trial was the failure to give a limiting instruction as to the purpose for the exhibit, when the respondent-defendant did not request that a limiting instruction be given, and did not raise the issue on appeal?

STATUTES INVOLVED

28 U.S.C. 1291 and 28 U.S.C. 2106 are set forth in Appendix B.

STATEMENT OF FACTS

The petitioner (hereinafter referred to as plaintiff), a twelve year old boy, lost his leg when a portable mechanized farm elevator on which he was climbing was accidentally engaged. The plaintiff brought suit against the manufacturer of the elevator for negligence and breach of warranty, his theory being two-fold:

1. *Duty to Warn.* The respondent (hereinafter referred to as defendant) should have warned users of the dangers in using its elevators as ladders since the defendant knew that this was a customary way these elevators were used. (See Appendix D-1, the testimony of the designer of the elevator), and

2. *Duty to Employ a Safe Design.* The elevator should have been designed with a stop-start station at its foot so as to enable the operator to see whether the mechanized surface was free of climbers when he was starting the machine.

Suit was commenced in Federal Court by plaintiffs, Michigan citizens, against defendant, an Illinois corporation, pursuant to 28 United States Code, Section 1332.

When the plaintiff rested his case, the defendant moved for a directed verdict. The District Judge denied defendant's motion and the defendant proceeded to introduce extensive proof in its behalf. The defendant rested and never renewed its motion for directed verdict; nor did it submit a written request instructing the jury to find the defendant not liable as a matter of law.

The jury returned a verdict for the plaintiff. The defendant never made a motion for judgment N.O.V. nor for a new trial.

During the trial, the defendant introduced testimony that other manufacturers have never warned and do not presently warn users not to climb these elevators. On cross examination, the plaintiff introduced two exhibits, manuals of other elevator maufacturers, which showed warning decals in the manuals and on the machine. The exhibits were admitted only for purposes of impeachment. The defendant never requested that the court instruct the jury on the

limited purpose for which they were received, either by way of an oral request or by way of a written request to charge. In fact, the attorney for the defendant expressly agreed without qualification or limitation that the jury could view the exhibits, among others, during its deliberations (Appendix D-2). There was no claim on appeal that a limiting instruction should have been given.

The defendant appealed to the Sixth Circuit Court of Appeals which reversed the jury's verdict for the reasons set forth in its opinion (Appendix A).

REASONS FOR GRANTING THE WRIT

1. Since the defendant failed to move for a directed verdict at the close of proofs or for a judgment N.O.V., the Court of Appeals was correct when it acknowledged that it could not review the sufficiency of the evidence:

> From the beginning of the Federal Rules of Civil Procedure, the Courts have been consistent in holding that the appellate court cannot review the sufficiency of the evidence in the absence of an unwaived motion for directed verdict.
>
> 5 J. Moore, *Federal Practice*, P. 50.05(1) page 2343 (2nd ed. Matthew Bender—1964).

In support of this proposition Professor Moore cites no fewer than ninety-five cases from all circuits.

While the Court of Appeals acknowledged that under Rule 50 Fed. R. Civ. P. it could not review the sufficiency of the evidence, it abused the requirements of the rule by doing just that. The standard which the court below sought to apply, namely "whether the plaintiff's evidence construed

most favorably to him" established a case of negligence, is precisely the same standard which is applied when a motion for directed verdict has been properly made. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962). This approach renders the requirement of a motion for directed verdict meaningless.

The opinion below thus establishes a new and unwarranted standard of review where Rule 50 has not been complied with. It contradicts authority from other circuits which holds that when there has been no motion for directed verdict, the appellate court is foreclosed from considering even whether "the evidence had that minimal quality required to allow conflicting inference." *Williams v. National Surety Corporation*, 257 F. 2d 771, 773 (5th Cir., 1958).

There is no case or authority cited in support of this new standard of review. Indeed this new standard departs from the previous standard of the Sixth Circuit itself:

> (T)he claimed insufficiency of the evidence is not before us [*and we must assume that the evidence supports the verdict*]. (Emphasis added.)
>
> *American National Bank & Trust Co. v. Dean*, 249 F. 2d 82, 83 (6th Cir., 1957).

While the Court of Appeals included the *un*bracketed portion of the above quotation in its opinion, it significantly omitted the bracketed words (Appendix A, page 3 of opinion). In its opinion below the Court of Appeals explicitly did not "assume that the evidence supports the verdict." Thus it discarded the rule of the *Dean* case and substituted instead a new standard of review.

2. The Court of Appeals held that the evidence did not support a case of negligence. In so doing, it reversed a jury verdict despite the failure of the defendant to raise or claim error below. Thus, the Court of Appeals undermined what Professor Moore contends is one of the two reasons that a failure to move for a directed verdict will bar a review of the sufficiency of the evidence:

> . . . an appellate court will not review issues on appeal that were not properly raised in the trial court.
>
> 5 J. Moore, *supra*, page 2345.

This rule had been widely recognized throughout the federal courts. *Een v. Consolidated Freightways*, 220 F. 2d 83 (8th Cir., 1955); *Itzkall v. Carlson*, 151 F. 2d 647 (2d Cir., 1945); *Western Produce Co. v. Folliard*, 93 F. 2d 538 (5th Cir., 1937).

However, aside from the general proposition that courts will review only error properly asserted in the lower court, there is a jurisdictional consideration. Federal Courts of Appeal have jurisdiction under 28 U.S.C. 1291 and 28 U.S.C. 2106 to review upon appeal only judgments, decrees, or orders of the trial judge. In this case there was no such legal ruling since the District Court was not provided with the opportunity to render a judgment, decree, or order on the liability question.[1]

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[1] Presumably it could be claimed that the entry of the judgment upon the verdict was improperly signed by the trial court. However, the entry of a judgment upon a jury verdict is a pure formality and may be done by the clerk of the court, Rule 59, Fed. R. Civ. P. Furthermore, there was never any claim of error or appeal from the formal entry of the judgment.

Thus, a number of courts have found that they have no jurisdiction in the face of a failure to move for directed verdict:

> This being a law action, we have appellate jurisdiction only, and the only way of securing a review of the facts is by interposing a motion for a directed verdict at the close of all the evidence and securing a ruling thereon. This presents a question of law.
>
> *Harnik v. Lilley,* 167 F. 2d 159, 160 (8th Cir., 1948).

Or, as Judge Learned Hand succinctly concluded:

> The Plaintiff did not ask for a directed verdict . . .. In such a situation no appeal lies from a judgment upon the verdict.
>
> *Carroll v. Hubay,* 272 F. 2d 767, 768 (2nd Cir., 1959).

See also *Mahoney v. New York Central Railroad,* 234 F. 2d 923 (2nd Cir., 1956); *Sturm v. Chicago & N. W. Ry. Co.,* 157 F. 2d 407 (8th Cir., 1946).

3. Since there was no ruling by the trial court from which an appeal could be taken, the Court of Appeals' reversal was of the jury's verdict as opposed to any decision of the trial judge. This has been generally considered a violation of the Seventh Amendment:

> . . . (T)he function of the appellate court is to review actions of the trial court; it does not and cannot sit to review the actions of the jury itself . . . (This) proposition rests on a constitutional base that precludes the reconsideration of verdicts by an appellate tribunal.
>
> 5 J. Moore, *supra,* page 2345.

This constitutional barrier to appellate review of jury verdicts has long been acknowledged. *Mutual Benefit Health & Accident Ass'n v. Bowman*, 99 F. 2d 856 (8th Cir., 1938).

According to Professor Moore, the Constitution is in part the reason for the rule that the appellate court may not review the sufficiency of the evidence in the absence of a motion for directed verdict. Accepting this limitation upon appellate review, appeal from a jury verdict can present no legal question as to liability. With no legal ruling available, the appellate court must look into the jury verdict itself in its quest for error. Thus, the reversal of the jury verdict reflects only a disagreement between the appellate court and the jury. In this posture the reversal of the verdict is a usurpation of the jury's role and, as such, violates the Seventh Amendment. *International Terminal Operating Co., Inc. v. N. V. Nederl, Amerlik Stoomv, Maats*, 393 U.S. 74, 89 S. Ct. 53, 21 L. Ed. 2d 58 (1968).

4. Prior to its opinion in this case, the Sixth Circuit Court of Appeals was in accord with all other circuits as to the scope of review in the absence of a motion for directed verdict. Compare the Sixth Circuit case, *American National Bank & Trust Co. v. Dean*, 249 F. 2d 82 (6th Cir., 1957) with *Wells v. Rau*, 393 F. 2d 362 (D.C. Cir., 1968); *Berman v. Palatine Insurance Co.*, 379 F. 2d 371 (7th Cir., 1967); *Gebhardt v. Wilson Freight Forwarding Co.*, 348 F. 2d 129 (3rd Cir., 1965); *Trans World Airline, Inc. v. Shirley*, 295 F. 2d 678 (9th Cir., 1961); *Carroll v. Hubay*, 292 F. 2d 767 (2nd Cir., 1959); *Sears v. Pauly*, 261 F. 2d 304 (1st Cir., 1958); *Williams v. National Surety Corp.*, 257 F. 2d 771 (5th Cir., 1958); *Roberts v. Sawyer*, 252 F. 2d 286 (10th Cir., 1958); *Edwards v. Steinns*, 207 F. 2d 734 (4th Cir., 1953); and *Harnik v. Lilley*, 167 F. 2d 159 (8th Cir., 1948).

The new standard of appeal, formulated by the Court of Appeals in this case, is a sufficiently explicit departure as to constitute a "conflict with the decision of another Court of Appeals on the same matter." United States Supreme Court Rules, Rule 19(1) (b); 28 U.S.C. Regardless of the conflict between the Courts of Appeal, the decision below either renders Rule 50 meaningless for purposes of appeal or is extremely confusing[2] and in need of clarification.

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[2] Even more confusing is the application of the standard adopted by the Court of Appeals to the facts herein. "Construed most favorably" to the plaintiff, the facts are that the defendant manufactured and sold a machine which it knew would be commonly used in a hazardous manner, yet never bothered to warn not to so use the machine. The only excuse for the failure to warn was that "farmers like to live dangerously" and that a warning would do no good because the users would have to be kept off with a "club." (Appendix D-3.)

The defendant further recognized that with this particular machine there would be certain situations when the operator's view would be blocked because of the location of the stop-start station on this particular type of elevator (p.t.o. power source). It further conceded that it manufactured other portable elevators (electrical and gasoline engine power source) which could be stopped and started at the foot of the elevator without any obstruction to the operator's view. The only excuse for not placing a stop-start device at the foot of the elevator on which the plaintiff lost his leg was that "it would repeat a mechanism." (Appendix D-4.)

These facts were adduced both through the direct and cross examination of the designer of the very machine upon which the plaintiff lost his leg. The Court of Appeals never cited nor discussed any of this testimony. Rather it sought to ignore the testimony, a procedure which cannot be considered proper even when the question of the sufficiency of the evidence has been preserved for appeal.

The Court of Appeals went on to hold that there was no case of negligence. Nowhere in its opinion, however, does the court cite one Michigan case despite the recent ferment and growth in Michigan law in the area of products liability. *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W. 2d. 627 (1959); *Hill v. Harbor Steel & Supply Corp.*, 374 Mich. 194, 132 N.W. 2d. 54 (1965); *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W. 2d. 129 (1965); *Fisher v. Johnson's Milk Company, Inc.*, 13 Mich. App. 10, 163 N.W. 2d. 652 (1969); *Witt v. Chrysler Corporation*, 15 Mich. App. 576, 167 N.W. 2d. 100 (1969).

(Continued on next page)

There is some suggestion by the Court of Appeals that the only difference upon review when there is no motion for directed verdict as distinguished from a situation where a motion for directed verdict is properly made at the close of all proofs is that the appellate court must consider the evidence presented by the defendant as well as that presented by the plaintiff. Thus, the court concludes that "since the defendant chose to proceed rather than to rest at that point, the question becomes whether so viewed there is evidence in the entire record to create a jury question" (Appendix A—page 4 of opinion).

In support of this analysis, the lower court cites *Dindo v. Grand Union Company*, 331 F. 2d 138, 141 (2nd Cir., 1964). This case does indeed hold that the introduction of evidence subsequent to a motion for directed verdict waives the benefits of the motion and that the appellate court, on appeal, must review evidence introduced by the defendant, as well as by the plaintiff. However, it is obvious that such a review may be undertaken only after the motion for directed verdict has been renewed.

This is clear from the cases and texts cited in the *Dindo* opinion. Even more persuasive, however, is that in the *Dindo* case itself the defendant did renew its motion for directed verdict and therefore was entitled to the review to which the defendant herein is not. While the *Dindo*

(Continued from preceding page)

The *Comstock* case, *supra*, is one of the leading cases nationally, 78 ALR 2d. 449, on both the question of warning and intervening cause. In that case, a unanimous Michigan Supreme Court cites the following cases as representing the Michigan law of manufacturer's liability for failure to warn. *Lovejoy v. Minneapolis-Moline Power Implement Co.*, 248 Minn. 319, 79 N.W. 2d. 688 (1956); *Haberly v. Reardon Company*, 319 S.W. 2d. 859 (Mo. 1959); *Hopkins v. E. I DuPont DeNemours & Co.*, 199 F. 2d 930 (3rd Cir., 1952); *Tomeo v. A. P. De Sanno & Son, Inc.*, 209 F. 2d. 544 (3rd Cir., 1954).

opinion does not state that the motion for a directed verdict was renewed (this was not relevant to the appeal therein), petitioner was able to so ascertain by a review of the briefs and records in that case (Appendix C).

Up until now it has been unnecessary for this court to clarify the appellate implications of failure to move for a directed verdict. The rule has been both clear and universally accepted. With the departure represented by the opinion below, this Court's intervention becomes necessary.

5. There was an objection to two exhibits and the district court ruled that they could be admitted for purposes of impeachment only. The Court of Appeals ruled that the District Judge should have given a limiting instruction relating to the purpose for which the exhibits were received and that the failure to give such an instruction was the only prejudicial error in the trial.[3]

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[3] The Court of Appeals also stated that it was error to receive into evidence another exhibit, a study relating to the hazards involved in the use of farm elevators. That the Court of Appeals should find the reception of such evidence to be error, again without citing one case or text, is puzzling. The study was one which was initially introduced when the defendant's chief designer took the position that there were no hazards associated with climbing the elevator. The exhibit indicated that it was a good safety rule not to climb elevators and not to let children climb them. The designer read the study in 1957 and the elevator in question was sold by the defendant in 1959. (Appendix D-5.)

Under such circumstances impeachment has been generally held to be proper and certainly within the trial court's discretion. *Downie v. United States Lines Co.*, 231 F. Supp. 192, 196 (E.D. Pa., 1964); *Winchell v. Moffat County State Bank*, 307 F. 2d. 280, 282 (10th Cir., 1962); *Ohio Associated Tel. Co. v. N.L.R.B.*, 192 F. 2d 664, 667 (6th Cir., 1951). Regardless of the impeaching nature of the exhibit, once the exhibit was introduced, the witness agreed that the admonitions of its authors were good safety rules. (Appendix D-7.) Since the witness' testimony coincided with the contents of the exhibit, the exhibit did not inject any new matter into the trial. Finally, since the Court of Appeals did not find that the admission of the exhibit was prejudicial error, it would not appear to be a basis for the reversal of the jury verdict.

The exhibits were introduced to impeach defendant's expert witness who, upon direct examination by the defendant, stated that manufacturers of portable elevators do not warn, either in literature or upon their machines, not to climb the elevators. One exhibit, an instruction manual of another manufacturer, contained such a warning and the other showed a picture of an elevator with a warning decal on it. The exhibits were not identified chronologically with respect to the date of manufacture of the elevator because the witness had contended, in effect, that even at the present time there are no such warnings (Appendix D-6).

After the District Judge admitted the exhibits for impeachment purposes only, the defendant never requested that the court instruct the jury as to the limited purpose for which the exhibits were admitted. No request for a limiting instruction was submitted in defendant's written requests to charge, nor did the defendant ever orally request such an instruction. In fact, the defendant specifically agreed that the jury could view all the exhibits, without qualification. If there had been any serious concern that a limiting instruction should be given, the defendant could have effectively raised this point when the court made a specific inquiry about the availability of exhibits to the jury. Thus, the trial court was deprived of any opportunity to correct the error, if any, in not giving such an instruction.

Rule 51, Fed. R. Civ. P. specifically bars reversal for error in failing to give an instruction which has not been requested. The rule has been strictly followed throughout the federal courts. *Gentry v. Louisville and Nashville Railroad Co.*, 371 F. 2d 829 (6th Cir., 1967); *Bartholomew v. Abramowitz*, 371 F. 2d 746 (D.C. Cir., 1966). The only possible exception to the rule is where there is clear error

which will result in a miscarriage of justice.[4] It is difficult to see how there can be deemed to have been a miscarriage of justice in the district court's failure to give a limiting instruction when the defendant thought so little of this issue that it was never raised in the appeal.

CONCLUSION

Without the benefit of a motion for a directed verdict, the defendant has obtained a reversal of an adverse jury verdict. Without the benefit of a request for an instruction limiting the jury's consideration of two exhibits the defendant has obtained a new trial because of the lack of such an instruction. These results violate both the letter and the spirit of two of the Federal Rules of Civil Procedure, two federal statutes and the Seventh Amendment to the United States Constitution.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[4] The Court of Appeals appears to consider the exhibits improperly admitted, even for impeachment purposes. However, because the opinion is again void of authority, the court did not bother to discuss a line of cases which supports the admissibility of the exhibits. *Reilly v. Pinkus*, 338 U.S. 269, 70 S. Ct. 110, 94 L. Ed. 63 (1949); *Wiseman v. Sinclair Refining Co.*, 290 F. 2d. 818 (2nd Cir., 1961); *Stottlemire v. Cawood*, 215 F. Supp. 266 (D.C., 1966). In view of these cases, there can be no claim of "clear error."

APPENDIX A

No. 18667

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

Donald L. Warner, by his next friend, James A. Warner, Jr., and James A. Warner, Jr.,
Plaintiffs-Appellees,
v.
Kewanee Machinery & Conveyor Company, a foreign corporation,
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided June 16, 1969.

Before: O'SULLIVAN, PECK and COMBS, Circuit Judges.

PECK, Circuit Judge. This action, which resulted in a jury verdict and judgment for the plaintiff in the District Court, grew out of an accident in which the plaintiff, then 12 years of age, was injured. The suit was brought on his behalf by his father as his next friend, and on behalf of the father individually. Herein, however, the boy will usually be referred to as the "plaintiff," and the defendant appellant as the "defendant."

At the time of the accident straw was being loaded into a haymow with the aid of a device manufactured and marketed by the defendant and known as a Kewanee Portable Elevator. In the use of such a device, bales of straw are placed on the bottom, or loading end, of the ele-

vator and paddles standing vertically from the axis of the elevator push the bales up and into the haymow (or other receiving area). The paddles are connected to chains resting on the floor of the elevator and were in this instance motivated by a power take-off from a tractor.

Shortly prior to the accident some difficulty developed because of the position of the bales at the lower or loading end of the elevator, and the tractor was turned off to permit adjustment. Several boys were engaged in the operation and while the elevator was stopped one of the older boys who had been in the haymow sought to change places with plaintiff and another boy who had been on the ground. As the record indicates was frequently if not customarily done, this was accomplished by using the elevator as a ladder or stairway, with the paddles serving as steps. The injuries complained of were suffered when the device was reactivated before plaintiff had stepped into the haymow and when his foot became caught underneath a paddle. He was dragged to the top of the elevator, and his leg was pulled around and underneath the elevator itself resulting in his injury. As a result of the accident plaintiff lost his left leg from a point below the knee.

Appellate review of this case presents unusual complications by reason of the fact that, on the one hand, while defendant made a motion for a directed verdict at the close of plaintiff's case it neither renewed that motion nor subsequently moved for judgment notwithstanding the verdict,[1] and, on the other hand, by the fact that plaintiff not only attempted to bolster a weak case during the presentation of defendant's case, but actually developed points

[1] We recognize but do not here pass upon the question of defendant's right to file the latter motion in the circumstances. See *Starling v. Gulf Life Ins. Co.*, 382 F.2d 701 (5th Cir. 1967); *Massaro v. United States Lines Co.*, 307 F.2d 299 (3rd Cir. 1962).

upon which he now primarily relies during cross-examination of defendant's witnesses.

In considering the significance of defendant's failure to renew its motion for a directed verdict or to later make a motion for judgment NOV, it must be kept in mind that defendant-appellant raises questions involving the legal sufficiency of the evidence. As Professor Moore points out, however, that question "is open only when the motion for directed verdict is renewed at the close of the trial." 5 J. Moore, Federal Practice ¶50.05(1), at 2322; *Gebhardt v. Wilson Freight Forwarding Co.*, 348 F.2d 129 (3d Cir. 1965); *American Nat'l Bank & Trust Co. v. Dean*, 249 F.2d 82 (6th Cir. 1957); *Minnehaha County v. Kelley*, 150 F.2d 356 (8th Cir. 1945). Professor Moore goes on to state *(supra)*:

> "For purposes of appeal, a motion for a directed verdict is necessary to raise the legal question as to whether the case should have been submitted to the jury. Whether the verdict is authorized by the evidence is a question which should be raised at the trial. If the sufficiency of the evidence goes unchallenged, no error on appeal can be attributed to the trial judge for submitting the case to the jury, for federal appellate courts do not directly review jury verdicts, but only rulings of the judge which may have affected the verdict. In this respect, it may be said that the necessity of a motion for a directed verdict, to raise the legal question as to the sufficiency of the evidence, is emphasized under the new Rules." (Citing *Baten v. Kirby Lumber Corp.*, 103 F.2d 272 (5th Cir. 1939).)

In accordance with this rule of law we again hold that since the defendant did not renew its motion for a directed verdict at the close of the entire testimony, "the claimed insufficiency of the evidence is not before us."

American Nat'l Bank & Trust Co. v. Dean, 249 F.2d at 83. However, the statement of this conclusion of law leaves open the more difficult question as to what it encompasses. Read literally the rule would seem to preclude even a consideration as to whether any evidence had been received on an essential element of the plaintiff's case, but we interpret the rule to provide as a test the question of whether plaintiff's evidence considered in the light most favorable to him established a prima facie case, or one properly submissible to a jury.

We parenthetically observe that even viewed in such most favorable light to him plaintiff's evidence in his case in chief was insufficient to create a jury issue. However, since the defendant chose to proceed rather than to rest at that point, the question becomes whether so viewed there is evidence in the entire record to create a jury question. *Dindo v. Grand Union Co.,* 331 F.2d 138, 141 (2d Cir. 1964). In so framing the issue, the word "evidence" must be construed as meaning evidence properly received, and that construction places on us the obligation of considering the Court's rulings on objections to evidence offered by the plaintiff. See *Pruett v. Marshall,* 283 F.2d 436 (5th Cir. 1960); *United States v. Mountain State Fabricating Co.,* 282 F.2d 263 (4th Cir. 1960); 5 J. Moore Federal Practice ¶50.05(1), at 2323; Barron & Holtzoff, Federal Practice & Procedure §1081, at 430.

Before passing to a consideration of the trial court's rulings on objections to specific areas of proffered evidence, we point out that plaintiff instituted and prosecuted this action on two theories, namely those of negligence in failing to warn and negligence of design (or breach of warranty). The claim under the first is that the defendant failed to afford proper warning to persons using its elevators, and the second contends that the machine could and should have

been differently designed. As to the warning, plaintiff argues that a warning should have been provided advising of the dangers of climbing upon these elevators or using them as ladders, especially since defendant should have known of such dangers. As to the design, plaintiff argues that the elevator should have been controlled by a start-stop device so located that the operator would have a full view of the machine, "as opposed to forcing the operator to engage or disengage the elevator [at a position from which] his view of the machinery was obstructed."

In accordance with the first of these contentions the jury was charged first that "plaintiffs claim and contend that the defendant Kewanee was negligent in failing to warn users of the machine of the hazards involved in climbing the machine when the defendant knew that it was customary for farmers and children to climb the machine and when it also knew that it was extremely dangerous for the machine to be used in such a way and finally when it knew that farmers and children were not aware of this danger." The issues concerning the alleged failure to warn center about three exhibits (plaintiff's Exhibits Nos. 14, 17 and 18) which were received in evidence.

These exhibits were received during plaintiff's cross-examination of two of defendant's witnesses and the vice of permitting a party to offer affirmative evidence during the presentation of his opponent's case becomes apparent. Had these exhibits, upon which heavy emphasis was placed by the plaintiff (and indeed by the trial court in its charge to the jury) been produced and offered as a part of plaintiff's case, proper identification, materiality and relevance could have been explored in a normal manner. In that circumstance the problems now primarily debated by the parties with reference to these exhibits would not exist.

The first of these exhibits is plaintiff's Exhibit 14, which is a booklet entitled "The Portable Farm Elevator," promulgated by the Agricultural Extension Service of Ohio State University. It was written by W. E. Stuckey, B. J. Lamp and K. A. Harkness. The authors are identified in the booklet as a safety specialist, an associate professor of agricultural engineering and an instructor in agricultural engineering of Ohio State University respectively, and Mr. Lamp and Mr. Harkness are further identified as being on the staff of the Ohio Agricultural Experiment Station. On the last page of the booklet there appear fifteen statements which may be fairly characterized as safety tips or suggestions, although they are not so identified. The thirteenth of these statements reads, "Don't use an elevator as a ladder or scaffold," and the fourteenth reads, "Never let children climb on an elevator." Through cross-examination of defendant's Chief Design Engineer (during the pertinent period) plaintiff established that he had seen the booklet; although the testimony on this subject is unsatisfactory, its most favorable construction for the plaintiff indicates that the witness had seen the booklet some ten years prior to the 1967 trial. The date of manufacture of the machine in question was shown to have been sometime between 1952 and 1959 and the trial judge admitted the exhibit as bearing on the question of defendant's "awareness" of its contents. Had the exhibit been identified by and offered during the testimony of a witness called by plaintiff, defendant woud have been afforded an opportunity to cross-examine concerning the authenticity and particularly the date of publication of the booklet. Not only was defendant denied this opportunity, but obviously the witness undergoing cross-examination by plaintiff lacked the ability to provide information in these areas. In other words, not only was proper evidence on these

crucial points not offered, it was not even available from the witness through whom the exhibit was offered. We conclude that the objection to receipt of Exhibit 14 should have been sustained.

Plaintiff's Exhibits 17 and 18 stand on even more precarious grounds so far as providing an affirmative portion of plaintiff's case is concerned. Exhibit 17 is an operator's manual distributed by the Viking Manufacturing Company in connection with an elevator produced by it, and Exhibit 18 is a similar manual published by the Allis-Chalmers Manufacturing Company in connection with a device manufactured by it and referred to as a "bail conveyor," but similar to the elevator involved here. Both of these exhibits contain general warnings to the users of these machines and each contains this statement: "Keep off implement unless seat or platform is provided. Keep others off." In the present context, the difficulty with these exhibits is that they were offered and received for the limited purpose of impeaching the testimony of one of defendant's witnesses during his cross-examination. However, this limited purpose seems to have been subsequently disregarded, as is apparent from the consideration afforded them by the Court in its instructions to the jury, and in this Court heavy reliance is placed on these exhibits as establishing the standard of care to which the defendant should be held. As in the case of Exhibit 14 defendant was denied an opportunity to explore the authenticity and materiality of the exhibits because they were identified (however inadequately) only by one of its own witnesses during cross-examination by the plaintiff, and received in evidence during defendant's case. Were we required to do so, we would have little hesitation in holding that these

exhibits were improperly received.[2] However, in connection with Exhibits 17 and 18 we need not make this determination since it is here concluded that the receipt of the exhibits for impeachment purposes only without an instruction to the jury to that effect constituted prejudicial error.

Reiterating our statement of the fact that defendant's failure to move for a directed verdict at the conclusion of all the evidence makes it necessary to view the record in its most favorable light to the plaintiff to determine whether it establishes a jury question, we now consider the record as it would stand without the three exhibits we hold to have been improperly received. We conclude that without the support of these exhibits plaintiff's case, to the extent it is bottomed on the failure to warn grounds, collapses and we hold that plaintiff has not offered other proof to establish a jury question on this issue.

Turning to plaintiff's second contention we consider his argument that the elevator was negligently designed since the start-stop device controlling it was not located in such a position that the operator had a full view of the whole machine. Plaintiff's entire case on this point must rise or fall on the testimony of one expert called by him. Were we permitted to consider the sufficiency of the evidence adduced through this witness to create a jury question we would unhesitatingly hold that it did not, but again we are restricted in our consideration by the fact that defendant

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[2] An additional valid ground for excluding these exhibits, and Exhibit 14 as well, exists by reason of the fact that on recross-examination the owner of the elevator testified that he did not receive any kind of a brochure or operating manual or any literature at the time of its purchase, and that he would not have read such literature had he received it. His son testified that they had "the book that come with [the elevator]" at home, but that he had never looked at it. See *Vroman v. Sears, Roebuck & Co.*, 387 F.2d 732 (6th Cir. 1967).

failed to renew its motion for a directed verdict at the close of all the evidence. This restriction does not, however, preclude an examination of whether plaintiff's evidence on the alleged negligent design (or breach of implied warranty) grounds presents a jury question as a matter of law.

In *Gossett v. Chrysler Corporation*, 359 F.2d 84 (1966) this Court was presented with an appeal from a judgment in favor of a plaintiff who allegedly suffered injury because of Chrysler's negligence in designing a part. The complaint in that case stated that the "negligence consisted of improperly designing [a] hood latch, improperly manufacturing and assembling said hood latch and in failing to properly test and inspect said hood latch. . . ." (*Gossett, supra*, at 85-86.) This Court speaking through Judge Cecil, defined the issue to be "[w]hether the trial judge should have directed a verdict for Chrysler, for the reason that, as a matter of law, it was not negligent in designing the type of safety latch that is the subject of this action." (*Gossett, supra*, at 88.) The identical issue presented in the present appeal is whether defendant was negligent as a matter of law in designing the type portable elevator that is the subject of this action. In resolving the issue presented in *Gossett* Judge Cecil stated (p. 88): "Bearing in mind that the manufacturer is not an insurer and that he is not bound to design a product that is either accident proof or fool proof we conclude, as a matter of law, that Chrysler was not negligent." Judge Cecil went on to point out that there was no defect in the latch as produced and that there was no negligence alleged in connection with its manufacture, which was strictly in accordance with its design. Exactly those statements may be made with reference to the portable farm elevator. The Court in *Gossett* then proceeded to offer with approval the following quotation from *Day v. Barber-Colman Co.*, 10 Ill. App. 2d 494,

508, 135 N.E.2d 231, 238 (1956) as presenting "[o]ur view of the applicable rule":

> "And there was no obligation resting on the defendant manufacturer to adopt every possible new device which might possibly have been conceived or invented, if there were any; it is not of itself negligence to use a particular design or method in the manufacture or handling of a product or doing a job which is reasonably safe and in customary use in the industry, although other possible designs, whether in use in the industry or not, might be conceived which would be safer, and evidence as to what is thought by some to be a safer design or method or product is not admissible."

Again, this language has precise application to the present situation. Timely objection was made to the evidence offered through plaintiff's expert as to what he thought might be a "safer design" for a portable elevator, and we conclude the objection to have been well taken.

Day v. Barber-Colman Co., supra, was also cited with approval in *Marker v. Universal Oil Products Co.,* 250 F. 2d 603 (10th Cir. 1957). It was there held that as a matter of law no jury question was presented where the injured party claimed that the design of the device involved could have included a safety feature which it did not incorporate, the Court observing that "the rule is well settled that neither designer nor manufacturer has a legal duty to adopt or produce a process or product incorporating only features representing the ultimate in safety." (*Marker, supra,* at 605.) As we have indicated, the trial court erred in not sustaining the objection to the portion of the testimony of plaintiff's expert setting forth his opinion as to what he thought would have been a safer design for a portable farm

elevator than that adopted by the defendant. Bereft of that evidence, it is clear that the record does not establish a case on the negligent design (or implied warranty) issue, and we so hold. However, in our view it makes little difference whether or not that portion of the expert's testimony remains in the record,[3] because for the reasons set out in *Gossett* and *Marker, supra,* we hold that there was no duty on the defendant to adopt a design representing the ultimate in safety, and we further hold that with or without the expert's opinion testimony plaintiff's evidence construed most favorably to him does not establish a case of negligence on the part of the defendant.

We have no alternative but to direct that the judgment entered in the District Court be vacated, and that a new trial not inconsistent with the foregoing be ordered.

[3] The evidence in the present case falls far short of establishing an industry pattern reaching the level of a trade standard.

APPENDIX B

Statutes Involved:

28 U.S.C. §1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Gaum, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, §48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, §12(e), 72 Stat. 348.

28 U.S.C. §2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963.

APPENDIX C

EXCERPTS FROM TRANSCRIPT OF *DINDO V. GRAND UNION COMPANY*, 331 F. 2d 138 (2nd Cir., 1964)

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(278) Mr. Akley: Defendant rests, your Honor and we would like to approach the Bench.

The Court: Defendant rests (2:44 p.m.).

Mr. Akley: May we approach the Bench.

Mr. Granai: No rebuttal your Honor.

The Court: Plaintiff rests. Evidence is closed. May I ask if the Plaintiff has any requests to charge?

• • • • •

(279) (In chambers): 2:50 p.m.)

The Court: "In Chambers" at the close of the evidence.

Mr. Akley: We would simply like to (280) renew our motion.

The Court: You may.

Mr. Akley: And, could we ask that it be brought forward and with all the grounds, without repeating it?

The Court: The Court is fully aware—the motion is renewed on all the grounds stated at the end of the plaintiff's case and you need not repeat them as the Court is familiar with them and the Court will deny the motion and grant an exception, to the Defendant (2:51 p.m.).

• • • • •

APPENDIX D

D 1

TESTIMONY OF JOHN H. FULPER:

Direct Examination

* * * * *

(23) "Q. Now it is true, is not not, sir, that you have known, even prior to 1959, that elevators were used as ladders by people on farms?

A. Yes.

Q. By adults?

A. Yes.

Q. And by children?

A. Yes.

Q. And you know that they would use this ladder to get from the bottom of the floor, up to let's say a hay or a straw mow?

A. Yes.

Q. Did you take this into consideration when you designed the elevator, that is, that people might be climbing it?

A. Yes.

Q. Okay. What did you take into consideration and what did you do?

A. Made the ladder strong enough to hold him up so it wouldn't break it."

* * * * *

(24) "A. Made the elevator strong enough to hold him up so it wouldn't break it.

Q. So in other words, you determined that it would be proper use of the elevator to use it as a ladder, if necessary?

A. Yes.

Q. And if someone were to climb it, that would be okay?
A. Yes."

• • • • •

D 2

(587) "Now, I will say this to you, gentlemen: It is my practice not to send the exhibits in at the outset because I fear the jury will get wrapped up in reading exhibits and not start deliberating. However, it is also my practice, should they request exhibits that have been introduced, they will be sent in to the jury without the necessity of calling counsel back.

Satisfactory, gentlemen?

Mr. Rosen: Satisfactory.

Mr. Miller: Satisfactory.

Mr. Goodman: Satisfactory, your Honor."

D 3

TESTIMONY OF JOHN H. FULPER:

• • • • •

(37) "Q. And there is no indication in any of your brochures or on your elevator that kids should stay away, is there?

A. People should control their children.

Q. Yes, but don't you think you might tell them that they (38) should keep their kids away from these elevators?

A. I can't be present at every one of these thousands of elevators.

Q. Okay. If you could be present you would tell them, wouldn't you?

A. I sure would.

Q. Okay. Why don't you tell them that in one of your directions for assembly and operation or any other bro-

chure that goes along with the sale of this particular equipment?

A. I believe it rather futile.

Q. Do you think you would be taking a futile step if you told them this?

A. Not if I was there and had a club.

Q. So you think not only would you have to tell them but you have to have a club?

A. That's right."

* * * * *

D 4

TESTIMONY OF JOHN H. FULPER:

* * * * *

Cross Examination

(394) "Q. (By Mr. Rosen): Did you ever consider, sir, putting a start or stop station on your elevator?

A. Not with PTO driven machines.

Q. Never did?

A. It is impractical.

Q. Why? It is impractical?

A. Yes.

(395) Q. Why?

A. You are repeating a mechanism that is already on the tractor."

* * * * *

D 5

TESTIMONY OF JOHN H. FULPER:

• • • • •

Direct Examination

(26) "Q. (By Mr. Goodman): Mr. Fulper, I want to show you what has been marked as Plaintiff's [deposition] Exhibit 1, [Trial Exhibit 14]. Will you kindly take a look at this, sir, and tell me whether you have ever seen this?

A. Yes, I have seen it.

Q. Can you tell me about when?

A. Oh, about ten years ago.

Q. —

Mr. Miller (interposing): I suppose.

(27) Mr. Goodman (continuing reading):

A. Oh, about ten years ago, I suppose."

• • • • •

Cross Examination

(361) "Q. Okay, Have you ever seen this one? This has been marked plaintiff's Deposition Exhibit No. 1.

(Whereupon the booklet referred to was marked by the Reporter for identification as Plaintiff's Exhibit No. 14.)

Mr. Rosen: Thank you.

Q. (By Mr. Rosen, continuing): You have seen this one, though, haven't you?

A. Yes, I have seen that one.

Q. And that was some ten years ago, isn't that true?

A. I think so. I don't know exactly when it was published. But I have seen this one."

• • • • •

D 6

TESTIMONY OF RANDALL C. SWANSON:

• • • • •

Cross Examination

(445) "Q. (By Mr. Rosen): It is not? In other words, what you are saying is that under no circumstances was this sign [warning] intended to be used on portable elevators?

A. I said that.

Q. And no one uses it; is that your testimony?

A. That's right. That's right."

• • • • •

D 7

TESTIMONY OF JOHN H. FULPER:

• • • • •

Direct Examination

(34) "Q. (By Mr. Goodman): That is deposition Exhibit No. 1. Okay. Did you read—I think it would be fair to say, the rules listed under the entitlement, play it safe? [Deposition taken May 11, 1967.]

A. Yes, I have read them.

Q. Okay, some ten years ago. Would you tell me whether you agree or disagree with this statement: Don't use an elevator as a ladder or scaffold.

A. Yes, I think that is a good admonition."

• • • • •

(37) "Q. How about, never let children climb on an elevator, is that a good admonition?

A. Yes."

• • • • •